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Amalan Tepat Sdn Bhd v Ng Kian Teng

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1444 OF 2008
TENGKU BAHARUDIN SHAH, LOW HOP BINGAND ABU SAMAH JJCA
28 DECEMBER 2011

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Civil Procedure — Pleadings — Alternative claim — Whether alternative claim not based on separate cause of action but on case pleaded in support of main claim — Whether dismissal of main claim warranted alternative claim to be also dismissed

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The respondent bought a property from the appellant developer pursuant to a sale and purchase agreement ('the sale agreement'). The respondent's case was that he entered into the transaction on the appellant's assurance that he could, if he participated in a guaranteed rental scheme ('the scheme'), receive from the property a gross rental of 13% of the property's purchase price or a nett rental of 10% of the purchase price every year for four years from the date of issuance of the property's Certificate of Fitness. The details of the scheme were contained in a Certificate of Rental Guarantee ('CRG') which was handed to him when he paid the 10% deposit to buy the property. The CRG was subject to the condition the appellant would lease the property from the respondent who would be required to execute a letter of undertaking and also agree to have the property furnished according to the appellant's specifications. After he took vacant possession of the property the respondent neither signed the letter of undertaking nor executed an agreement ('GRRA') to lease the property to the appellant because he felt certain terms in the GRRA were unreasonable and contrary to the terms in the CRG. As there was no resolution to the stalemate between the parties, the respondent issued the appellant a notice terminating the sale agreement on the ground the appellant had breached the terms of the CRG. He also demanded a full refund of the property's purchase price and sought damages for breach of contract. The respondent filed an action in the High Court, inter alia, for a declaration that he had rightly terminated the sale agreement and for an order that the purchase price be refunded to him. Alternatively, he claimed for loss of rental on the property based on the formula of four years of nett rental as set out in the CRG. The High Court dismissed the respondent's claim for the declaration holding there had been no breach of the sale agreement. It however allowed the alternative claim for loss of rental on the basis the guarantee under the CRG was distinct and independent of the sale agreement as nothing in the sale agreement required the respondent to sign the GRRA. The appellant appealed against the decision to the Court of Appeal.

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Held, allowing the appeal with costs and setting aside the decision of the High Court:

(1) The respondent's pleaded case was that the appellant had committed a fundamental breach of the CRG entitling him to terminate the sale agreement. But there was no provision in the sale agreement on the guaranteed rental return. Once the prayer for the declaration was dismissed, in that there was no breach of the sale agreement, the alternative claim should have been dismissed as a matter of course (see paras 16–17).

(2) The alternative claim for loss of rental was contrary to the respondent's own pleading and could not be allowed. The alternative claim was not based on a separate cause of action. It could not be based on the appellant's alleged breach of the terms and conditions of the CRG as the respondent had not complied with the conditions stated therein. The guaranteed rental return under the CRG was conditional upon the respondent agreeing to lease back the property to the appellant (see paras 14–15).

[Bahasa Malaysia summary

Responden membeli hartanah daripada pemaju perayu berikutan perjanjian jual beli ('perjanjian jualan'). Kes responden adalah bahawa dia memasuki transaksi tersebut atas jaminan perayu bahawa yang dia boleh jika dia menyertai skim penyewaan terjamin ('skim') menerima daripada hartanah penyewaan kasar sebanyak 13% daripada harga belian hartanah atau penyewaan bersih sebanyak 10% daripada harga belian setiap tahun untuk selama empat tahun dari tarikh pengeluaran Sijil Kelayakan hartanah. Butiran skim tersebut terdapat di dalam 'Certificate of Rental Guarantee' ('CRG') yang mana telah diberikan kepadanya apabila dia membayar deposit 10% untuk membeli hartanah tersebut. CRG adalah tertakluk kepada syarat bahawa perayu akan menyewa hartanah daripada responden yang dikehendaki melaksanakan surat akujanji dan juga bersetuju untuk hartanah tersebut dilengkapi mengikut spesifikasi perayu. Selepas dia mengambil milikan kosong hartanah tersebut responden tidak menandatangani surat akujanji ataupun melaksanakan perjanjian ('GRRA') untuk menyewakan hartanah tersebut kepada perayu kerana dia berasa terma-terma tertentu dalam GRRA tersebut tidak munasabah dan bertentangan terma-terma dalam CRG. Memandangkan tidak terdapat resolusi terhadap jalan buntu di antara pihak-pihak, responden menyerahkan kepada perayu notis menamatkan perjanjian jualan atas alasan perayu telah memungkiri terma-terma CRG. Dia juga meminta bayaran balik harga penuh belian hartanah tersebut dan memohon ganti rugi untuk kemungkiran kontrak. Responden memfailkan tindakan di Mahkamah Tinggi, antara lain, untuk perisytiharan bahawa dia telah secara betul menamatkan perjanjian jualan dan untuk perintah bahawa harga belian dibayar balik kepadanya. Secara alternatif, dia menuntut kerugian

A sewa atas hartanah berdasarkan formula empat tahun daripada sewa bersih seperti yang ditetapkan di dalam CRG. Mahkamah Tinggi menolak tuntutan responden untuk perisytiharan memutuskan bahawa tidak terdapat kemungkiran perjanjian jualan. Ia walau bagaimanapun dibenarkan untuk membuat tuntutan alternatif untuk kerugian sewa atas dasar jaminan di bawah
B CRG adalah berbeza dan bebas daripada perjanjian jualan seperti tiada apa-apa pun di dalam perjanjian jualan menghendaki responden untuk menandatangani GRRA tersebut. Perayu merayu terhadap keputusan tersebut kepada Mahkamah Rayuan.

C **Diputuskan**, membenarkan rayuan dengan kos dan mengetepikan keputusan Mahkamah Tinggi:

(1) Kes pli responden adalah bahawa perayu telah melakukan kemungkiran asas CRG yang memberikan dia hak untuk menamatkan perjanjian jualan. Tetapi tidak terdapat peruntukan di dalam perjanjian jualan atas
D pulangan sewa terjamin. Apabila sahaja permohonan untuk perisytiharan ditolak, di mana tidak terdapat kemungkiran perjanjian jualan, tuntutan alternatif patut ditolak sebagai perkara yang ditentukan (lihat perenggan 16–17).

E (2) Tuntutan alternatif untuk kerugian sewa adalah bertentangan pli responden sendiri dan patut tidak dibenarkan. Tuntutan alternatif bukan berdasarkan atas kausa tindakan berasingan. Ia tidak dapat didasarkan atas dakwaan perayu mengenai kemungkiran terma-terma dan syarat-syarat CRG memandangkan responden tidak mematuhi
F syarat-syarat yang dinyatakan di dalamnya. Pulangan sewa terjamin di bawah CRG adalah bersyarat apabila responden bersetuju untuk menyewakan semula hartanah tersebut kepada perayu (lihat perenggan 14–15).]

G **Notes**

For a case on alternative claim, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) para 6174.

Cases referred to

H *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517, FC (refd)

Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)

I **Appeal from:** Civil Suit No S7–22–1523 of 2003 (High Court, Kuala Lumpur)

KL Wong (Mahendran with him) (RY Nathan & Partners) for the appellant.

Yongeswary Singam (Tan Lee Eng with him) (Tan Norizan & Associates) for the respondent.

Abu Samah JCA (delivering judgment of the court):

[1] There is only one issue in this appeal. It is whether the learned judicial commissioner ('JC') was right in allowing the respondent's alternative claim after having dismissed his main claim for a declaration that he had rightly terminated the sale and purchase agreement ('the sale agreement') which he entered into with the appellant.

[2] The background facts leading to the filing of this suit by the respondent against the appellant can be shortly stated as follows. The appellant was the developer of a project, known as 'A Farmosa Resort', Melaka. The respondent purchased from the appellant a piece of land held under Lot PT793 together with a single storey bungalow to be built thereon ('the property') at a purchase price of RM415,273.

[3] It is the respondent's pleaded case that he purchased the property based on the representations and assurances made by the appellant that a purchaser would be guaranteed with a rental return of a gross sum equivalent to 13% of the purchase price or a net sum equivalent to 10% of the purchase price per annum for four consecutive years with effect from the date of issuance of the certificate of fitness ('CF').

[4] After paying the 10% deposit for the purchase of the property the appellant gave the respondent a written guarantee, namely, the certificate of rental guarantee ('CRG'). The CRG states that the respondent would be guaranteed a rental return of a sum equivalent to:

> (a) gross (rental) sum equivalent to 13% of the Purchase Price for each year wherein you shall further be liable to pay to us and/or to the respective parties the housekeeping charges amounting to 25% of the gross (rental) sum and maintenance charges of the Property; or
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> (b) net (rental) sum equivalent to 10% of the purchase price for each year (after deducting the housekeeping charges and maintenance charges of the said property).
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> WHICHEVER IS HIGHER for a period of two (2) years from the date the certificate of fitness for occupation of the property is issued by the relevant authority with an option to renew of another two (2) years provided always that:-
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> (i) …
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> (ii) We shall lease the property on your behalf;
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> (iii) You shall execute a Letter of Undertaking addressed to us in respect of the rental return scheme and you shall fully furnish the property in accordance with our specifications

[5] The respondent took vacant possession of the property together with the keys to the single storey bungalow after he had paid the full purchase price and all other outstanding payments. The CF was issued on 7 February 2002.

[6] On 6 August 2002 the appellant wrote to the respondent asking him to reconfirm whether he agreed to participate in the rental scheme and if so, to sign a letter of undertaking confirming his agreement and that he agreed to have his property furnished in accordance with the appellant's specifications with the costs of furnishing to be borne by the respondent.

[7] The respondent agreed to participate in the rental scheme and to pay the cost of furnishing the property but disagreed with some of the terms in the proposed leaseback agreement, known as guaranteed rental scheme agreement ('GRRA'), which he considered as unreasonable and contrary to the CRG and had the effect of varying the terms in the CRG. For instance the terms in the GRRA confer on the appellant the discretion to vary the date of commencement of tenancy from the date of issuance of CF to a date to be determined by the appellant; to amend or add new provisions to the GRRA and to require the respondent to give an irrevocable power to the appellant to deduct any amount due under the GRRA. He had proposed some amendments to the terms and conditions in the GRRA, which the appellant disagreed.

[8] This led to a stalemate. The property was left vacant in its original state of condition and remained unattended as the respondent had no intention to stay there. Feeling cheated, he decided to terminate the sale agreement, return the property to the appellant and ask for a refund of the full purchase price plus some other costs.

[9] By a letter dated 25 March 2003, the respondent's solicitor sent a notice of termination of the sale agreement to the appellant, 'on the ground of your fundamental breach of the rental guaranteed scheme' and demanded a refund of the full purchase price and damages for breach of contract in the sum of RM60,542.37. The words, 'rental guaranteed scheme' in the said letter refer to the CRG and not the GRRA.

[10] On 30 September 2003 the respondent commenced this action for a declaration that he had rightfully terminated the sale agreement due to the said fundamental breach; and for an order that the appellant refund the full purchase price of RM415,273, pay all other outgoings and/or expenses in respect of the property and upon satisfaction thereof the property be transferred to the appellant, at its own cost and expense.

[11] Alternatively, the respondent claims a loss of rental amounting to RM166,109.20, (RM41,527.30 x 4 years) being the four years net rental as guaranteed by the appellant.

[12] The learned JC dismissed the respondent's claim for the said declaration on the ground that there was full performance of the sale agreement. The dismissal of the respondent's claim for the said declaration means that the appellant had not committed any fundamental breach of the sale agreement. There was no appeal by the respondent against that decision. The learned JC however allowed the alternative claim for loss of rental in the sum of RM166,109.20 on the ground that the guarantee under the CRG was a distinct document independent of the sale agreement. The learned JC held that there was no provision in the sale agreement requiring the respondent to sign the GRRA.

[13] Learned counsel for the appellant submitted that the claim for loss of rental under the CRG was not pleaded and should not be allowed. The respondent's cause of action is not based on breach of the terms of the CRG. Its cause of action is based on the breach of the sale agreement. It was further submitted that the guaranteed rental return is conditional upon the respondent signing a letter of undertaking and a leaseback agreement, that is, the GRRA. Thus, there was no legal basis to allow the alternative claim for loss of rental when the respondent had not complied with the conditions in the CRG and that he had at all the times in possession of the property.

[14] The respondent urged us not to interfere with the findings of facts by the learned JC and reminded us of the principle that the appellate court will not readily interfere with the findings of facts which the law had entrusted to the trial judge: *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517. It was also the respondent's contention that under the terms of the CRG the respondent was not required to enter into a guaranteed rental return agreement. We do not find any merit in this contention as the guaranteed rental return under the CRG is conditional upon the respondent agreeing to leaseback the property to the appellant.

[15] We agree with the appellant that the alternative claim for loss of rental is contrary to the respondent's own pleading and should not be allowed. It is clear from the statement of claim that the alternative claim for loss of rental is not based on a separate cause of action. It cant be based on the appellant's alleged breach of the terms and conditions of the CRG as the respondent had not complied with the conditions stated therein. It would also be premature to claim specific performance of the CRG for similar reason that the respondent

had not complied with the conditions stated therein. The guarantee for rental return is subject to the proviso that the respondent, among others, agree to lease the property to the appellant.

[16] The respondent's pleaded case is that the appellant had committed a fundamental breach of the CRG which entitled him to terminate the sale agreement. The alleged breach is that the appellant had imposed certain terms and conditions in the GRRA which are unreasonable and contrary to the CRG. In our view once the prayer for the said declaration is dismissed and that there was no breach of the sale agreement, the alternative claim should be dismissed as a matter of course.

[17] We note that the respondent's pleading is quite unusual. The respondent is asking for a declaration that he had rightly terminated the sale agreement, not on the ground that there was a fundamental breach of the terms of the sale agreement itself, but on an extraneous ground, namely, for 'fundamental breach of the rental guaranteed scheme'. There is no provision in the sale agreement on guaranteed rental return. Thus, there is absolutely no basis to allow the alternative claim for loss of rental.

[18] For the aforesaid reasons, we allowed the appeal and set aside the order of the learned JC, with costs here and below.

Appeal allowed with costs and decision of the High Court set aside.

Reported by Ashok Kumar